Supreme Court, U.S.
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No. 94-1817

In The

Supreme Court of the United States

October Term, 1994

ALACARE HOME HEALTH SERVICES, INC.,

Petitioner,

vs.

GADSDEN REGIONAL MEDICAL CENTER, FORMERLY BAPTIST HOSPITAL OF GADSDEN, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there exists a viable federal question for review by the United States Supreme Court.

2. Whether the decision of the Alabama State Health Planning Agency's Certificate of Need Review Board, made the subject of the petition, implicated in any fashion the substantive due process rights of the Petitioner under the *Fourteenth Amendment to the United States Constitution.*

PARTIES INVOLVED

Petitioner/Appellant:

Alacare Home Health Services, Inc. (No known parent corporation or subsidiaries.)

Respondent/Appellee:

Quorum Health Group, Inc., Parent Corporation.

Gadsden Regional Medical Center, formerly Baptist Hospital of Gadsden, Inc.

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OPINIONS BELOW

By action taken on the 3rd day of February, 1995, the Supreme Court of Alabama denied the Petition for Writ of Certiorari to the Court of Civil Appeals filed by Alacare Home Health Services, Inc. ("Alacare"). *See* A-54a. The decision of the Alabama Court of Civil Appeals, from which this appeal is attempted, is styled *Alacare Home Health Services, Inc. v. Baptist Hospital of Gadsden, Inc.*, 1994 WL 182001, ___ So.2d ___ (Ala. Civ. App. 1994), *cert. denied*, ___ So.2d ___ (Ala. 1995). A-1a.

STATEMENT OF JURISDICTION

The decision, concerning which review is sought, is a judgment of the Court of Civil Appeals of Alabama dated May 13, 1994. The Court of Civil Appeals of Alabama denied rehearing on June 17, 1994. The Supreme Court of Alabama denied Petitioner Alacare's Writ of Certiorari to that court on February 3, 1995, which denial the Petitioner has used as providing a basis for its filing with this United States Supreme Court.

The jurisdictional ground assigned by the Petitioner is 28 U.S.C. § 1257(a). In particular, Petitioner asserts that the decision below should be reviewed by the Supreme Court because it constitutes a final judgment or decree from the Court of Civil Appeals where "any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." Petitioner further contends that jurisdiction is proper under Supreme Court Rule 10.1(c) if "a state court . . . has decided an important question of federal law in a way which conflicts with the applicable decisions of the Court."

Respondent Gadsden Regional Medical Center, Inc., formerly Baptist Hospital of Gadsden, Inc. ("Baptist" herein, for clarity) respectfully says that the assigned jurisdictional grounds

are merely hypothetical constructs under which legitimate claims could be advanced if there were a factual setting supporting such arguments. Under the instant facts, however, the so-called "substantive due process" argument was never properly preserved for appeal and, even if it had been, there are no facts or legal theories supporting such an argument.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Respondent will not attempt to add to, or delete from, the constitutional provisions, statutes and regulations cited by the Petitioner as being associated with this matter. While the Respondent takes the position that there is no basis for the granting of the petition in the first instance, the Respondent does agree that — to the extent any argument can be made by the Petitioner in support of its position — the provisions cited would be appropriate given the factual and procedural history of this matter.

Amendment XIV of the Constitution of the United States; Section 22-21-260 *et seq.* of the *Code of Alabama (1975)* and the regulations governing the award of Certificates of Need are contained in the Appendix. For ease of reference, and in conformity with the arrangement of such citations in the filing by the Petitioner, Respondent sets forth the following items and references for the Court, *viz:*

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STATEMENT OF THE CASE

A. The Nature of the Case

This appeal deals with a decision of the Alabama State Health Planning Agency ("SHPA"), the sole designated state health planning and development agency of the State of Alabama. *See* Section 22-21-260 *et seq.* of the *Code of Alabama (1975).* By Agency action on December 3, 1991, Baptist Hospital of Gadsden, Inc. (today, Gadsden Regional Medical Center, but referred to herein, for clarity, as "Baptist") was approved in its plan to establish and operate a home health agency in Etowah County, Alabama. That decision by the Certificate of Need Review Board ("CONRB") was then made subject of a SHPA "Fair Hearing" (*See* Section 22-21-275(14) of the *Code of Alabama (1975)* where the parties submitted the matter to an administrative law judge on the record and briefs of the parties.

Following the filing of briefs, the administrative law judge issued his "final order" on or about May 28, 1992, *completely reversing what the nine-member CONRB had decided.* The result reached by the hearing examiner was the denial of the Baptist CON application and the approval of the competing Alacare application. It was the decision of the "Fair Hearing Officer"

which was made the subject of a Notice of Appeal and a Petition for Judicial Review in the Circuit Court of Etowah County, Alabama.

The matter proceeded to review before the Circuit Court upon the administrative record, as supplemented, regarding the two Certificate of Need ("CON") applications filed with the SHPA by Baptist and Alacare Home Health Services, Inc. ("Alacare"). Both applicants were seeking approval from the health regulatory agency for authority to establish and operate home health services in the Etowah County service area. Because the applicants were subjected to a "comparative review" under applicable SHPA procedures, only one of the two applicants could be approved for the service. The approval of one of the applicants, of necessity, had to result in the denial of the other.

B. Course of Proceedings Below

The facts associated with the Petition for Judicial Review had their origin, as noted above, in the SHPA public hearings conducted in Montgomery on December 3, 1991, before the CONRB. In those hearings, the Board approved the Baptist plans to establish and operate a home health agency. The decision of the CONRB came following the reception of relevant testimony and evidence from Baptist, under SHPA Project No. AL-91048, and a similar presentation of testimony and evidence from Alacare, which was proceeding under the aegis of SHPA Project No. AL-91090.

At the conclusion of the hearing, Board member Hannah Brock moved to approve SHPA Project No. AL-91048 (Baptist) and to deny SHPA Project No. AL-91090 (Alacare). The motion was duly seconded by Board member Jim Purcell and then put to a vote. The Baptist project was approved after a quorum of the CONRB, by a majority vote of the members voting, indicated support for the Baptist project and rejection of the Alacare

project. Section 410-1-8-.05(1) of the SHPA *Rules and Regulations (Rev. 1991)*. A-63a.

The decision of the Board was later subjected to a "Fair Hearing" review and a hearing examiner was duly appointed and chosen to handle the case. The parties agreed that the issues would be decided by the hearing officer based on the administrative record and written pleadings and briefs. Following the filing of such documents, and a consideration of the record of the proceedings, the hearing officer issued a nine (9) page "Final Order" in the matter on or about May 28, 1992, totally reversing what the nine-member CON Review Board had decided. The result reached by the hearing examiner was *denial* of the Baptist CON application and the *approval* of the Alacare CON application. A-55a.

C. Disposition in the Circuit Court

In its Petition for Judicial Review in the Etowah County Circuit Court, Baptist argued that the result reached by the administrative law judge had been unsupported by the facts and by a proper application of the law to those facts. Baptist argued that there was no substantial legal basis for the hearing officer's conclusion that the CONRB action had been "arbitrary" or "capricious," especially in light of the testimony and evidence supporting approval of the Baptist application. Baptist pointed out the long line of cases from the appellate courts of Alabama wherein the principle has developed that "even in cases where the evidence is meager or the testimony generalized, it is not the province of the reviewing [entity] to substitute its judgment or pass upon the wisdom of the decision of the administrative agency charged by the Legislature with the responsibility for making such decisions." Relying upon, among others, the decisions of *State Health Planning Agency v. Rivendell of Alabama, Inc.*, 469 So.2d 613 (Ala. Civ. App. 1985) and *Hughes v. Jefferson County Board of Education*, 370 So.2d 1034 (Ala. Civ. App. 1979), Baptist argued that the Circuit Court should

reinstate the original decision in favor of Baptist and adverse to Alacare since it was amply supported by record evidence.

The Circuit Court agreed. It proceeded in its judicial review of the administrative record under the aegis of the Alabama Administrative Procedure Act, Section 41-22-1 *et seq.* of the *Code of Alabama (1975)*. Baptist did not seek to have the Circuit Court substitute its judgment for that of the SHPA, as to the weight of the evidence on questions of fact, but, rather, contended that the conclusions reached by the hearing examiner were not supported by the administrative record; they were affected by error of law; they were clearly erroneous in view of the substantial evidence on the whole record and they were unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *See* Section 41-22-20(k) of the *Code of Alabama (1975)*. Put another way, Baptist argued that because the initial decision of the CONRB was amply supported by credible record evidence, the administrative law judge was not justified in reversing the Agency decision.

As Baptist pointed out in the trial court, the scope of the review by the SHPA Fair Hearing Officer is expressly limited to the following issues, *viz:*

> (a) Whether the application meets the requirements of Section 22-21-266, *Code of Alabama, (1975)*, with respect to inpatient facilities or services, if applicable, as well as **whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these Rules, and whether the application is consistent with the appropriate State [Health] Plan;**

> **(b) Whether the State Agency acted in an arbitrary or capricious manner, without a reasonable justification for the decision or in the absence of fixed standards against which the application was measured,** or whether the State Agency otherwise abused its discretion in deciding among competing applications;
>
> (c) Whether the State Agency **materially failed to follow review procedures** as set out in these Rules and whether the error was substantial in its effect. (Emphasis added).

Section 410-1-8-.22 of the SHPA *Rules and Regulations (Rev. 1991)*. So long as the application under review meets the review criteria for the issuance of CON authority, it is clearly not the province of the "Fair Hearing Officer" to upset, modify or reverse the action of the CONRB. Baptist contended, and contends here today, that under this limited standard of review, the administrative law judge was not authorized to substitute his judgment for that of the CONRB itself and obliterate the reasonable and supported determination of the Agency tribunal. If there is credible legal evidence in the administrative record supporting the approval of the application, Baptist argued, and if the CONRB was reasonably justified in having decided this matter in favor of Baptist and against Alacare, then the analysis was due to end.

In essence, Baptist argued to Circuit Judge Rhea that since there was no evidence pointing to an abuse of discretion or error of law on the part of the SHPA's CONRB, or that the State Agency had materially failed to follow its own review procedures, the decision of the Fair Hearing Officer was, itself, an abuse of discretion. Since this was the case, the plaintiff argued, the decision was due to be set aside and the original SHPA decision reinstated. The trial court agreed, issuing its Memorandum

Opinion, Judgment and Injunction on or about June 10, 1993. A-5a. Circuit Judge Rhea found that the CONRB's decision had been reasonable, not arbitrary and capricious, and that it had been based upon adequate principles and fixed standards. The court found the Board had been justified in concluding that Baptist was the "most appropriate applicant" when compared with Alacare.

The Circuit Court further found that the original CONRB decision, and not that of the Fair Hearing Officer, was the administrative decision which was due to be upheld by the court. The court found the SHPA decision to have been "well reasoned and supported by the testimony and evidence" while the Fair Hearing decision was "poorly reasoned and unsupported by the testimony and evidence." Going further, the court wrote:

> According to the Alabama State Health Plan in effect at the time of filing of the Baptist application, Etowah County was an "underserved" area of our State. Therefore, according to the State Health Plan and SHPA (by means of the Staff Report), the Baptist project was susceptible to being approved by the CON Review Board. See, e.g., Alabama State Health Plan, 410-2-4.04 (8) (d) (4). Indeed, the Board's original ruling specifically found that the Baptist project was consistent with the State Health Plan and that Baptist had demonstrated a community need for additional home health services. The Board further reasonably found that Baptist was the more appropriate applicant, as contrasted with Alacare, the freestanding provider. The SHPA Staff Report noted no inconsistency of the Baptist project with the applicable provisions of the State Health Plan and, additionally, specifically found Etowah

County to be underserved in terms of home health services.

The Court notes that Alacare acknowledged these findings of SHPA and even acknowledged that Baptist was an appropriate applicant for CON approval. **Moreover, Alacare was apparently so convinced that Baptist would be approved by the SHPA for home health that Alacare encouraged the CON Review Board and the Fair Hearing Officer to approve both the Baptist application as well as the Alacare application.** When the matter went to the Fair Hearing Officer for review, following action in Baptist's favor by the CON Review Board, the single issue was whether the Board had acted arbitrarily and capriciously in selecting Baptist as the more appropriate applicant.

Alacare's contention to the Fair Hearing Officer was that it was the "more appropriate applicant" *simply because certain of its projected charges were lower than those projected by Baptist.* It contended that because this was the case, and because Alacare was proposing to "expand" its services into Etowah County, it should be approved.

It is without dispute, however, that facility charges are simply one of many considerations before the CON Review Board when it decides between competing CON applicants. SHPA's own regulations provide that the determination is "to be

> established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public." Section 410-1-6-.09 of the SHPA *Rules and Regulations (Rev. 1991).* Among other things, the regulation states that this analysis must include professional capability; management capability and adequate manpower. **The record is replete with the information provided to the Board, by Baptist, regarding its ability to render this health service and why it is a more appropriate applicant to provide the service than Alacare.**

(Emphasis added). A-37a.

In essence, the Circuit Court found that the decision of the State Health Planning Agency had complied with the procedural and substantive mandates of state law and the Agency's own regulations and policies. The court further determined that the CON Review Board's decision was well supported in the evidence and that it was based upon adequate principles and fixed standards, comporting with the requirements of Alabama law and the SHPA's own rules and regulations. No constitutional issues were ever examined.

Alacare filed an appeal with the Alabama Court of Civil Appeals. On or about May 13, 1994, the intermediate Alabama court affirmed the Circuit Court's decision. A-1a. Contrary to the assertion of the Petitioner, the Court of Civil Appeals did **not** hold that the Board's "action in deviating from its normal criteria was not arbitrary, but was within the Board's discretion, and was thus reasonable." Indeed, the appellate court went to great lengths in its assessment of the method under which the trial court reached its decision, noting in particular that the Court of Civil Appeals "reviews the trial court's ruling with no presumption of

correctness, 'since that court was in no better position to review the order of the Board than we are.'" A-2a. However, the intermediate court made it clear that it found the action of the trial court reasonable and well supported in the evidence. In that regard, the Court of Civil Appeals stated:

> The Fair Hearing Officer's scope of review is limited to: (1) whether the CON application satisfies the statutory requirements; (2) whether SHPA made an arbitrary or capricious decision, or abused its discretion in deciding among competing applications or (3) whether SHPA materially failed to follow the review procedures and made a substantial error. SHPA *Rules and Regulations* Sec. 410-1-8-.22 (1) (a). The Fair Hearing Officer is prohibited from considering, inter alia, "the correctness, adequacy or appropriateness of the criteria, standards or plans by which the application was measured," and from substituting his judgment for SHPA's factual findings. SHPA *Rules and Regulations,* Sec. 410-1-8-.22 (1) (b) (b); see also: Sec. 410-1-8-.25 (3). The criteria for a CON include availability of alternatives; need for the project; population statistics and growth; effect on existing facilities or services; expansion of existing services being favored over the establishment of new facilities; community reaction; access to medically underserved groups and whether the project complements and supports the existing health care system. SHPA *Rules and Regulations,* Secs. 410-1-6-.04 to -.08; see also Ala. Code 1975, Section 22-21-264.

In its ruling approving Baptist's CON

application, the Board specifically noted that neither capital costs nor new construction was required for Baptist. In determining that Alacare was not the most appropriate applicant, the Board specifically noted, inter alia, that capital costs for Alacare were approximately $9,000. The Board further noted that issuing the CON to Baptist should not affect other providers because the area was underserved. Testimony at the public hearing also revealed that Baptist had an approximately 80-year history in the health field in Etowah County. The Board's ruling also expressly noted that Baptist proposed higher charges than those proposed by Alacare, and that Alacare had approval to operate home health services in several Alabama counties.

It appears of record that an important factor in the hearing officer's decision to reverse the Board's decision was the fact that Baptist proposed somewhat higher charges than Alacare; however, the hearing officer also concluded that the Board was justified in determining that approval of Baptist's application "would improve accessibility of such services by ensuring the availability of less costly alternatives to inpatient care" and "the grant of [Baptist's] application would improve the accessibility of services in the area." **It appears to this court that the Board gave considerable weight to the accessibility factor over the cost factor, and that the hearing officer impermissibly considered the appropriateness of the cost**

> **factor. In view of the Board's recognized expertise regarding CON approval, the weight assigned to the evidence presented to the Board is within the Board's discretion.** *Health Care Authority of the City of Huntsville v. State Health Planning Agency*, 549 So.2d 973 (Ala. Civ. App. 1989). **The hearing officer is prohibited from considering the appropriateness of the criteria by which the application was measured. SHPA *Rules and Regulations* Sec. 410-1-8-.22 (1)(b). Therefore, we find no error in the trial court's determination to reinstate the approval of the application for a CON filed by Baptist.**

(Emphasis added).

Alacare filed its Application for Rehearing, which the Court of Civil Appeals denied on or about June 17, 1994. A-53a. Following the denial, the Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court. The petition was denied on or about February 3, 1995, after which time the Petitioner filed notice with the Circuit Court of Etowah County that it intended to ask this Court for a writ of certiorari to the Alabama Supreme Court.

The Petitioner seeks to frame a "federal" issue in this matter by asserting that the CON Review Board "arbitrarily deviated" from fixed review standards when it decided this matter in favor of Baptist and against Alacare. It argues that the action of the state agency "violates principles of substantive due process as protected by the Fourteenth Amendment."

The Respondent takes the position that no issue appropriate for review by the United States Supreme Court is presented. Indeed, this matter has always constituted a state law issue which

was decided in conformity therewith. If any "due process" considerations were ever implicated in this matter they were certainly **procedural** and not **substantive** in nature. This is underscored by the fact that there can be no legitimate argument that SHPA failed to act in accord with "adequate principles and fixed standards." The decision in favor of Baptist, and adverse to Alacare, specifically references the review standards and the sections of Alabama law and Agency regulations which are applicable to the circumstances.

Arguably, if the SHPA had made a decision without a hearing, or if the Agency had made a decision after receiving no legal evidence in support of the Baptist application, a "substantive due process" argument might have some bearing on these proceedings. However, for the reasons which follow, it will be amply clear that there is simply no basis for the Supreme Court's granting the Alacare petition herein.

SUMMARY OF THE ARGUMENT

Alacare failed to properly raise and preserve the alleged constitutional issue of deprivation of procedural or substantive due process in the hearings below and, moreover, the federal question purportedly presented on this petition was not squarely considered and resolved by the Alabama Court of Civil Appeals. Hence, there is no jurisdiction for this Court to grant the petition for writ of certiorari.

Even if Alacare had properly raised and preserved a constitutional argument, that fact alone is not tantamount to there being an actual constitutional issue before the Supreme Court. Indeed, this petition is merely an effort on the part of Alacare to delay the full implementation of the final judgment of an Alabama court of competent jurisdiction.

Rather than raising an issue of constitutional dimensions,

Alacare is asking the United States Supreme Court to substitute its judgment for the decisionmaking processes of the Alabama Court of Civil Appeals. In essence, this is a case where the Petitioner simply disagrees with the findings and conclusions of the highest state court to have heard this action and, now, is seeking to overturn the decision under the guise of a due process argument. For the reasons which follow, this Supreme Court should not sanction such activity. It should deny the petition without further proceedings.

REASONS FOR DENYING THE WRIT

I. ABSENCE OF SUBJECT MATTER JURISDICTION

The Petitioner candidly admits to understanding that it "bears the burden of persuading this Court of its jurisdiction over this petition **absent any express reference in the opinion of the court below to the federal constitutional provision upon which the Petitioner relied in that court.**" (Emphasis added). *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). It also recognizes the well settled principle that in order for the Court to assume jurisdiction over a case, the federal question presented in the case must be "either raised or squarely considered and resolved in state court." *Gates, supra*, 462 U.S. at 218 n.1. The Petitioner contends that while the claim of deprivation of substantive due process was never expressly raised or resolved below, in terms of a constitutionally grounded argument, that the matter was nevertheless litigated and is susceptible to a hearing before the Supreme Court.

The Respondent disagrees.

How does Alacare frame the issue? In brief, counsel state that the company "contends that the [CON Review] Board granted the CONs of three other facilities using the mandatory fixed set of standards which it does consider, but in deciding

between Alacare's and Baptist's applications, the Board, without reason, used a differently prioritized set of standards than with the prior applications. That arbitrary deviation from the fixed review standards caused the Board to conclude that Baptist was the 'most appropriate applicant,' thus awarding the CON to Baptist. Alacare contends that had the Board used its fixed set of standards, the Board would have only been able to select Alacare as the most appropriate application. That arbitrary and capricious use of different, inconsistent standards for deciding between competing CON applicants by the Board violates the due process rights of the Petitioner, Alacare. The constitutional question of due process violations, therefore, is the question which gives this Court jurisdiction to review the Petitioner's case."

It is instructive to note, however, that the alleged constitutional issue was not raised by Alacare in the agency and state court proceedings. While it is true that Alacare argued to the SHPA Fair Hearing Officer that the decision of the Board had been "arbitrary or capricious" — and that Alacare then made the same argument before Circuit Judge William Rhea in the Etowah County proceedings — ***such argument is a specifically enumerated basis for Alabama Administrative Procedure Act judicial review which is separate and apart from the argument of deprivation of substantive or procedural due process.***

Under Section 41-22-20 (k) of the *Code of Alabama (1975)*, the bases for Circuit Court judicial review are expressly set out, *viz:*

> * * * The Court may reverse or modify the decision or grant other appropriate relief from the Agency action, equitable or legal, including declaratory relief, if the Court finds that the Agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that Agency,

> or where no such statutory standards for judicial review are applicable to the Agency, if substantial rights of the Petitioner have been prejudiced because the Agency action is:
>
> (1) **In violation of Constitutional or statutory provisions;**
>
> (2) In excess of the statutory authority of the Agency;
>
> (3) In violation of any pertinent Agency rule;
>
> (4) Made upon unlawful procedures;
>
> (5) Affected by other error of law;
>
> (6) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or
>
> (7) **Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.**

(Emphasis added).

At every stage of the proceedings below, beginning with the challenge to the CON Review Board's decision before the Fair Hearing Officer, Alacare attacked the Agency decision *not* on the basis of a constitutional infirmity but, rather, on the basis that the conclusion reached by the Board had been "arbitrary or capricious" in terms of the application of the review criteria to the relevant facts.

Regardless of the creativity of the Petitioner, that argument cannot possibly be extrapolated into an argument that Alacare was somehow denied its constitutional right to procedural or substantive due process of law. At most, the Alacare argument has always been that the CON Review Board failed to give certain evidence the weight which Alacare said it was due, while the Board gave certain other evidence a weight which was different from what Alacare argued it should receive. That does not constitute a due process argument. Rather, Alacare has simply argued for the substitution of its judgment (through the Fair Hearing process) for that of the CON Review Board. When the Fair Hearing Officer substituted his judgment for that of the Board, the Circuit Court — along with the Alabama Court of Civil Appeals — said that he crossed over the bounds of his authority.

If Alacare had desired to raise a true constitutional claim, it could easily have done so in the proceedings below. At the time that Baptist obtained judicial review in the Circuit Court, Alacare could have asserted that the original decision of the CON Review Board had been defective in a due process sense. It could have argued that the decision was so unsupported by evidence as to constitute a deprivation of Alacare's fundamental right to a hearing before a neutral and detached decisionmaker. It could have argued that the Agency vote was so flawed that both procedural and substantive due process rights were violated. But Alacare did not make such arguments.

Rather, Alacare simply argued that the facts presented in the adminstrative hearing did not justify the decision reached by the Review Board. Accordingly, or so went the argument, the ultimate decision of the CON panel was due to be characterized as "arbitrary or capricious." The Alabama Administrative Procedure Act — under which the case was reviewed in the state circuit court proceedings — clearly and expressly provides *both* for an attack based on abuse of discretion and for one based on

alleged violations of constitutional safeguards. The former argument was made; the latter argument was not made.

Since Alacare never raised the constitutional argument below, it cannot be heard to complain for the first time to the Supreme Court on a petition for writ of certiorari. To its credit, Alacare says at page seven of its petition that it "acknowledges that it did not mention specifically the substantive due process clause in its argument," but, yet and still, that "the Fourteenth Amendment prohibition against arbitrary and capricious government action was and remains the basis of the argument at issue in the instant case." Alacare seeks to overcome its obvious failure in not having raised the constitutional claim by saying that "[t]he issue of the unconstitutionality of the Board's actions is simply an enlargement of the 'arbitrary and capricious nature' argument which has been considered throughout this cause of action. . . . Therefore, the issue of whether questions can be considered by the Alabama Supreme Court that are not timely or directly raised is established by the actual practice and decisional law of that court."

Yet it is without dispute, of course, that the Alabama Supreme Court did not rule on the merits of this matter. By order dated February 3, 1995, the Supreme Court of Alabama denied the petition for writ of certiorari filed by Alacare. A-54a. It is equally true (and clear) that the Alabama Court of Civil Appeals conducted its "arbitrary and capricious" analysis on state law grounds rather than under the Fourteenth Amendment.

Citing Section 41-22-20 (k) of the *Code of Alabama (1975)*, the Court of Civil Appeals found the Fair Hearing Officer's decision was "not only not supported in the record, but it is not supported by existing case law. In *Sexton v. Tuscaloosa County Civil Service Board*, 426 So.2d 432 (Ala. Civ. App. 1983), the Court of Civil Appeals of Alabama stated: 'A decision is not arbitrary where there is a **reasonable justification** for the

decision or where the determination is founded upon adequate principles or **fixed standards.'** *Sexton,* 426 So.2d at 435 (emphasis in original)."

"In this case, there have always been 'fixed standards' upon which the decision was grounded. These fixed standards are found in Section 22-21-264 of the *Code of Alabama (1975)* and the agency regulations. The statute, and accompanying regulations, provide the findings prerequisite to the issuance of a Certificate of Need for home health services. There is evidence in the record indicating a clear and unmet need for additional home health services in the Etowah County health service area. There is ample evidence showing that Baptist is prepared, and has the necessary capabilities, to meet that need. **Therefore, there was reasonable justification for SHPA's approval of Baptist and its denial of Alacare. The decision, therefore, was not arbitrary or capricious as a matter of law."** (Emphasis added). A-48a - 49a.

Even in the conclusion reached by the Court of Civil Appeals, it is clear that no Fourteenth Amendment analysis was requested or conducted. "Even in cases where the evidence has been meager or the testimony 'generalized,' the courts of Alabama have held that it is not the province of the reviewing entity to substitute its judgment, or pass upon the wisdom of the decision of the administrative agency charged by the Legislature with the responsibility of making such decisions. *See, e.g., Hughes v. Jefferson County Board of Education,* 370 So.2d 1034 (Ala. Civ. App. 1979); *State Health Planning Agency v. Rivendell of Alabama, Inc.,* 469 So.2d 613 (Ala. Civ. App. 1985).

". . . In this case, there was more than ample evidence to support the CON Review Board's original approval of the Baptist application. Therefore, the approval of Baptist, and the concurrent denial of Alacare, cannot be said to have been 'arbitrary' or 'capricious.' " A-50a - 51a.

Alacare cannot reasonably contend that it properly raised a substantive due process argument in the proceedings below. At most, it asserted that there was an inconsistent interpretation of SHPA *Rules and Regulations* between the Alacare/Baptist decision and other decisions related to home health agency applications. Such a proposition goes to the argument that the CON Review Board abused its discretion, or was arbitrary, in how it decided cases dealing with the same subject matter. That type of argument is a far cry, under any interpretation, from a claim of deprivation of substantive due process. In the main, the argument is one which is more related to the proper *weight* the SHPA should have given to the evidence before it in different cases.

Since the Alacare arguments below were centered around the contention that the CON Review Board gave more weight to the so-called "cost factors" in one set of cases and less weight to the "cost factors" in another set, no constitutional claim is raised. There were a myriad of other review criteria which were considered *in addition to the costs associated with the establishment of the new institutional health services.* Clearly, some of the applicants may have been considered more favorably than others — even if they proposed higher total project costs — because their applications were so superior to the competitor applicants in other (*e.g.*, non-cost) areas. It is well settled that the United States Supreme Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987); *Webb v. Webb*, 451 U.S. 493, 496-497, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981).

In the proceedings below, Alacare never adequately or properly presented a constitutional claim for denial of substantive due process of law. The Petitioner only asserted

"arbitrary or capricious" conduct by the state agency — under the aegis of the state Administrative Procedure Act — before the Alabama Court of Civil Appeals. The Alabama Supreme Court refused to hear the case, denying the petition for writ of certiorari without opinion. When " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in [the United States Supreme Court] can affirmatively show the contrary.' *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11, 40 L. Ed. 2d 642, 94 S. Ct. 2116 (1974) (quoting *Street v. New York*, 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969))." In this case, Alacare has made no such showing.

For the reasons assigned, Respondent Baptist suggests that the Supreme Court has no basis for assuming jurisdiction over this petition. The issue of substantive due process was never properly raised or preserved in the proceedings below and, therefore, cannot be raised for the first time in pleadings filed with the United States Supreme Court.

II. AGENCY DECISION DID NOT IMPLICATE CONSTITUTIONAL RIGHTS OF PETITIONER.

Even if the Supreme Court were to conclude that the issue of an alleged deprivation of substantive due process had been properly raised and preserved below, it is clear beyond any reasonable argument that the facts in this case do not support the granting of certiorari. Even when the facts stated under the petition are reviewed in the light most favorable to Alacare, yet and still it is obvious that what Alacare complains of is not a deprivation of a federal constitutional right. Rather, Alacare complains because it simply disagrees with the merits-based decision of a state adminstrative agency. Instead of utilizing the appellate process to review previously raised, genuine,

constitutional claims, Alacare would apparently have this Court operate in the fashion of a state court of last resort. In essence, Alacare merely wants "one more bite at the apple." It is not presenting a *bona fide* constitutional claim at all. For such reason, the petition is due to be rejected without further proceedings.

While it is true that the Due Process Clause of the Fourteenth Amendment to the United States Constitution comprises a "general prohibition against arbitrary and unreasonable governmental action," *Thompson v. Gallagher,* 489 F.2d 443, 446 (5th Cir. 1973), it is also true that not every action taken by a governmental entity can be properly categorized as "arbitrary and unreasonable" simply because the adversely affected party disagrees with the merits-based decision of the subject agency or board. Further, it is beyond debate that not every arbitrary action of a governmental agency or board — even when proved with clear and convincing evidence — constitutes activity rising to the level of constitutional dimensions.

Procedural due process mandates that the governmental machinery utilized to adjudicate private property rights function properly and that it afford the process which the person or entity affected is due. Substantive due process, on the other hand, deals with governmental action which is unlawful and unconstitutional regardless of the procedural safeguards which accompany the complained of conduct. Charitably said, there is "no way" that Alacare can possibly contend in good faith that the State Health Planning Agency (or Baptist) deprived it, in this matter, of its constitutional right to substantive due process of law. For the reasons which follow, such an argument must be utterly rejected as frivolous and without merit.

There is a very basic difference between a procedural due process claim and a claim grounded on alleged violations of substantive due process. When the claim centers around substantive due process arguments, the relevant inquiry involves

"an assessment of the constitutionality of the action itself," irrespective of the available (provided) procedural safeguards and protections. *See, e.g., Hudson v. Palmer,* 104 S. Ct. 3194 (1984); *Augustine v. Doe,* 740 F.2d 322, 326 (5th Cir. 1984); *Wolff-Lillie v. Sonquist,* 699 F.2d 864, 871 (7th Cir. 1983); *Owen v. Lash,* 682 F.2d 648, 651 (7th Cir. 1982) (Justice Stewart, sitting by designation). This distinction exists because "there are certain government actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." *Parratt v. Taylor,* 451 U.S. 527, 545 (1981) (Blackmun, J., concurring). Regarding substantive constitutional rights, "the constitutional violation is complete at the moment when the harm occurs." *Gilmere v. City of Atlanta,* 774 F.2d 1495, 1500 (11th Cir. 1985) (*en banc*). This is the case with both specifically enumerated constitutional rights as well as rights such as the right to be free from excessive force which is protected under the aegis of "substantive due process." *Gilmere, supra.*

In the matter at bar, it is difficult to imagine how Alacare contends that it was deprived of substantive due process protections. In order for that to be the case, Alacare would necessarily have to show this court that — for example — it had its authority to do business confiscated without any kind of a hearing at all. In other words, there would need to be a showing that the State of Alabama engaged in an intentional, wrongful, taking of the property of the Petitioner, not merely that some hearing which was conducted was defective or deficient.

Another example might be where there were no fixed standards or guiding principles for the state agency to use in coming to its decision between competing CON applicants. If the CON Board, for example, had no structure to its decisionmaking system, nor a meaningful post-judgment judicial review process, and the parties appearing before the Board had no way of knowing the principles to be utilized by the Board in coming to its

decision, then and in such event there could be a stated violation of substantive due process. Even then, the facts would have to be carefully evaluated and assessed before coming to a final decision.

In this case, though, it is quite clear that none of these issues exists.

In the matter at hand, adequate principles and fixed standards are set out in the CON statute and in the SHPA *Rules and Regulations*. The parties are advised, well in advance of filing applications and participating in hearings, what will and what will not be considered as relevant evidence and testimony. The decisionmaking process takes place in an open hearing, attended by the public and wherein parties can appear alone or with legal representation. The voting takes place at the public hearing, by uplifted hands upon motions duly made and seconded. The final decision of the state agency is reduced to writing, and reasons for CON approvals or denials are included in the final orders which are issued to the parties. A meaningful system of post-judgment judicial review is in place.

Just as important as the procedural machinery itself, the CON Review Board considers a wide array of factors in coming to its decisions. Only *one* of the many factors in this case was the cost associated with the Alacare and Baptist projects. As a matter of fact, it is instructive to note that the Circuit Court, in reversing the action taken by the hearing examiner, expressly enumerated many of the considerations which went into the Board's initial decision. The Circuit Court, correctly finding under the Alabama statute that the court's review was required to be "a narrow one," explained the basis for its action, *viz:*

> Because the Fair Hearing officer was obligated by regulation to simply review (1) whether the Baptist application's approval

> was consistent with the applicable provisions of the State Health Plan; (2) whether SHPA acted in an arbitrary or capricious manner "without a reasonable justification for the decision or absent fixed standards against which the application was measured" and (3) if the agency "materially failed to follow [its] review procedures," the court's review is a narrow one. Aside from the issue of whether Alacare had standing to pursue a Fair Hearing decision in light of its withdrawal of further opposition to the Baptist project, **the question before this court is whether the Fair Hearing Officer exceeded his authority in reversing the CONRB's earlier findings.**

(Emphasis added). A-12a, 13a.

Without reciting all the findings of the Circuit Court, it is clear from the record that an extensive and exhaustive review of the administrative record was conducted before a decision was reached in the case below. If this court reviews the findings of fact and conclusions of law made and entered by the circuit court, and later affirmed by the Court of Civil Appeals, it will become crystal clear that Alacare was afforded both procedural and substantive due process of law. There was nothing "arbitrary" about the CON Board's decisionmaking process; rather, the only obviously "arbitrary" conduct was that demonstrated by the Fair Hearing Officer's reversal of the initial Board decision.

As some indication of the extent to which the Board had lawful grounds for its merits-based decision in favor of Baptist and adverse to Alacare, the circuit court enumerated some of the areas of evidence which are contained in the administrative record before SHPA. They include, but are not limited to: (a) no

capital costs associated with the project for Baptist; (b) no new construction associated with the establishment of the home health service; (c) anticipated charges are reasonable, even if somewhat higher than Alacare; (d) population to be served is large enough to support additional provider; (e) Etowah County shown as an "underserved" county under the applicable State Health Plan; (f) projected breakdown on revenue between private pay, third party payors, Medicare and Medicaid appears reasonable; (g) Baptist capable of providing skilled nursing services, personal care, physical therapy, speech therapy, occupational therapy, medical social services and medical supplies onsite; (h) applicant already has existing private-duty nursing service and a track record of having provided home health services in Etowah County on a contract basis for Etowah County Health Department; (i) hospital-based home health agency, as contrasted with freestanding services, offers significant advantages of greater continuity of patient care; (j) specialty services can be offered through the Baptist parent corporation which are not immediately available through Alacare's operations; (k) provision of home health services through the hospital expected to reduce the average length of stay of Baptist patients and thereby reduce overall patient costs in the community, a goal which is totally consistent with the overall purpose of the health planning and development program; (l) Baptist has recognized experience in the delivery of home health services; (m) patient needs identified by Baptist coincide with the needs shown and identified under the applicable Alabama State Health Plan; (n) because hospital plans to emphasize and focus on provision of services, primarily, to its own patients, there is expected to be little adverse impact upon other existing home health providers in the health service area; (o) Baptist has longstanding referral, linkage and transfer agreements with other health care providers inside and outside Etowah County; (p) Baptist' proposal would be quicker and less expensive to implement than a new, start-up, home health organization which does not have a presence in the county to begin with and (q)

regional hospitals such as Baptist have advantages over freestanding home health agencies. Those include: (1) the ability to reduce hospital costs and thereby reach a greater number of underserved areas and patients; (2) access to substantial inpatient revenues, giving the hospital-based agency financial flexibility that is often lacking in a freestanding setting; (3) the strong employment of qualified health care professionals with a number of different skills; (4) the capability to become involved in IV therapy services, durable medical equipment; home respiratory care; home nutrition; pain management and other health care fields related to support of the hospital's "core" business of inpatient and outpatient care and (5) the ability to strengthen the continuum of care for both the hospital and the home health patients because of the bridge which then exists between acute care and home care services.

The above items are by no means all-inclusive of what the CON Review Board — and later the circuit court — considered as relevant evidence. But as some indication of how the circuit court felt about the evidence, Judge Rhea wrote as follows, *viz:*

> It is clear to the court that the administrative agency fact finders were very interested in review criteria **beyond the "charge data" related to the cost per home health visit.** While charges can (and should) obviously be considered, they are certainly not intended to be dispositive of the Board's decision in cases such as this one. The court, accordingly, cannot conclude that Alacare is entitled to prevail in this action simply (or even primarily) because of a comparison of "charge data" between the two applicants. **Such a conclusion would constitute an "apples and oranges" type comparison.**

(Emphasis added). A-30a.

Going still further, after a lengthy analysis of the facts, the circuit court came to a related conclusion of law. In deciding to uphold the original CONRB decision in favor of Baptist, the court wrote as follows, *viz:*

> Alacare's contention to the Fair Hearing Officer was that it was the "more appropriate applicant" simply because certain of its projected charges were lower than those projected by Baptist. It contended that because this was the case, and because Alacare was proposing to "expand" its services into Etowah County, it should be approved.
>
> It is without dispute, however, that **facility charges are simply one of many considerations before the CON Review Board when it decides between competing CON applicants.** SHPA's own regulations provide that the determination is "to be established from the evidence as to the ability of the person, directly or indirectly, to render adequate service to the public." Section 410-1-6-.09 of the SHPA *Rules and Regulations* (*Rev. 1991*). Among other things, the regulation states that this analysis must include **professional capability; management capability and adequate manpower.** ***The record is replete with information provided to the Board by Baptist, regarding its ability to render this health service and why it is a more appropriate applicant to provide the service than Alacare.***

(Emphasis added). A-37a.

Alacare contends that it suffered substantive due process deprivation because the CON Review Board used "a different set of decisional criteria in [the instant] case, where in prior decisions the Board consistently was concerned with cost factors." Yet such argument obviously ignores the undisputed fact that *numerous considerations other than cost and accessibility* were relied upon in the Board's decisionmaking process. It is just impossible to contend, in good faith, that those were the "only" — or even the primary — factors which the CON Review Board used in coming to its final decision.

CONCLUSION

This case involves little more than Alacare's dissatisfaction with the merits-based decision of the Alabama State Health Planning Agency. It does not involve constitutional deprivations, procedural or substantive.

Because the hearing below comported with the fundamental requirements of procedural and substantive due process, and because the due process argument was never properly raised or preserved in the proceedings below, the Respondent respectfully suggests that the Supreme Court should deny the Alacare petition without further delay. The opinion of the highest court in Alabama to decide this case, the Alabama Court of Civil Appeals, is entirely correct and the decision clearly does not involve any matters of constitutional dimensions. If Alacare had any desire to raise such a claim, and preserve it for possible appeal to the United States Supreme Court, it should have done so much earlier than today.

Respectfully submitted,

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